

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DANIEL RIVERA,

Plaintiff,

- against -

HOME DEPOT U.S.A., INC.,

Defendant.
-----X

HOME DEPOT U.S.A., INC.,

Third-Party Plaintiff,

-against-

BRYAN'S HOME IMPROVEMENT CORP.,

Third-Party Defendant.
-----X

16-cv-7552 (JGK)(OTW)

**DECLARATION OF HOWARD
S. EDINBURGH OBJECTING
TO HOME DEPOT'S
APPLICATION FOR COSTS
AGAINST BHIC**

Howard S. Edinburgh, declares pursuant to 28 U.S.C. § 1746 and under penalty of perjury that:

1. I am a member of the firm Herzfeld & Rubin, P.C., attorneys for third-party defendant Bryan's Home Improvement Corp (BHIC) and I am fully familiar with the facts and circumstances set forth herein.

2. I submit this Declaration in Opposition to defendant/third-party plaintiff Home Depot U.S.A. Inc's. ("Home Depot") application for an award of costs against BHIC. This Declaration constitutes BHIC's objections to Home Depot's submitted Bill of Costs.

3. BHIC does not object to the award of costs concerning the costs associated with the deposition transcript of plaintiff Daniel Rivera conducted over two days or the associated cost of a Spanish speaking interpreter. Nor does BHIC object to the transcript cost for Home Depot's

deposition witness Jorge Palacios. However, BHIC does object to Home Depot's application to be reimbursed for its voluntary decision to obtain daily trial transcripts for the two of the three day damages only trial conducted on April 9, 10 and 11, 2018 before former federal Judge Katherine Forrest. The cost of the two daily trial transcripts for April 9 and 10 is found at Exhibit "D" (Doc. 256-4) filed on October 13, 2020 and amounts to \$799.59 for Day 1 of the trial (April 9, 2018) and \$813.33 for Day 2 of the trial (April 10, 2018) or a total of \$1,612.92.

4. Local Civil Rule 54.1 (c)(1) provides:

"The cost of any part of the original trial transcript that was necessarily obtained for use in this Court or on appeal is taxable. Convenience of counsel is not sufficient. The cost of a transcript of Court proceedings prior or subsequent to trial is taxable only when authorized in advance or ordered by the Court."

5. It is not the custom of the Court to award the cost daily trial transcripts where, as here, the "dailies" were not authorized or court ordered, unless the trial itself was unusually long and complicated. *Bauta v. Greyhound Lines, Inc.*, 2019 U.S. Dist. LEXIS 227937 *12-13, 2019 WL 8060181 (E.D.N.Y. June 17, 2019). Here, Home Depot's attorneys were present but did not participate in the damages only trial, did not cross-examine the lay or medical trial witnesses. The trial was from beginning to end three days with all of the liability issues and most of the damage issues, except for a determination of past and future pain and suffering, resolved prior to trial.

6. Moreover, Home Depot did not appeal the jury verdict and subsequent judgment entered against it and paid nothing for the Record on Appeal to the Second Circuit which was prepared by BHIC, at its cost, as appellant. Home Depot's attorneys may in 2018 have sought the "dailies" for their own convenience for whatever purpose they contemplated, but that convenience is not, under law, justification for awarding costs of the trial transcripts.

WHEREFORE, for the reasons and objections stated herein, Home Depot's application for costs related to payment for “dailies” of the transcripts for two of the three trial days it sat through without examining or cross-examining any of the trial witnesses, should be rejected as not taxable and inappropriate.

Dated: New York, New York
October 26, 2020

HERZFELD & RUBIN, P.C.

By: Howard Edinburgh
Howard S. Edinburgh (4427)
hedinburgh@herzfeld-rubin.com
Attorneys for Third-Party Defendant
Bryan's Home Improvement Corp
125 Broad Street
New York, New York 10004
(212) 471-8529